



COVERSHEET

Minister	Hon Dr David Clark	Portfolio	Commerce and Consumer Affairs
Title of Cabinet paper	Response to the Commerce Commissions Retail Grocery Sector Market Study	Date to be published	8 June 2022

List of documents that have been proactively released

Date	Title	Author
May 2022	Response to the Commerce Commission's Retail Grocery Sector Market Study	Office of the Minister of Commerce and Consumer Affairs
23 May 2022	Response to the Commerce Commission's Retail Grocery Sector Market Study CAB-22-MIN-0186 Minute	Cabinet Office
May 2022	Regulatory Impact Statement: Government response to the Commerce Commission Grocery Sector Market Study – Policy decisions	MBIE (Published 5 July 2022)

Information redacted

YES / NO [select one]

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Some information has been withheld under the grounds of confidential advice to government and constitutional conventions.

In Confidence

Office of the Minister of Commerce and Consumer Affairs

Chair, Cabinet Economic Development Committee

Response to the Commerce Commission's retail grocery sector market study

Proposal

- 1 This paper seeks agreement to the Government's response to the Commerce Commission's (the Commission's) recommendations in the retail grocery sector market study (the market study).

Relation to government priorities

- 2 This paper relates to the priority of supporting New Zealanders in response to increasing costs of living (including increasing grocery prices) by improving competition in the retail grocery sector. More workable competition in the retail grocery sector ultimately benefits New Zealand consumers by contributing to lower grocery prices, better quality products, increased innovation, a wider grocery product range and better service.

Executive Summary

- 3 On 8 March 2022, the Commission released its final report on competition in the retail grocery sector. The Commission found that competition in this sector is not working well for consumers and that the market structure is characterised as a duopoly (of two major grocery retailers – Foodstuffs New Zealand and Woolworths New Zealand) with a fringe of other grocery retailers that have a limited impact on competition.
- 4 The Commission recommended a range of actions to address its findings, including:
 - 4.1 freeing up land for grocery retail development through changes to planning laws and prohibiting the use of restrictive covenants on land and exclusivity covenants in leases;
 - 4.2 implementing a wholesale grocery access regime where major grocery retailers offer wholesale supply to other retailers, subject to certain regulatory measures;
 - 4.3 addressing imbalances in bargaining power between major grocery retailers and suppliers by introducing a mandatory grocery code of conduct, an exception for collective bargaining by suppliers and strengthening unfair contract terms provisions for suppliers in the Fair Trading Act 1986;
 - 4.4 helping consumers make informed purchasing decisions by mandating unit pricing for grocery products and recommending that major grocery retailers ensure their pricing and promotional practices, data collection and use practices, and terms and conditions for loyalty programmes are easy to understand; and
 - 4.5 establishing a grocery sector regulator and dispute resolution scheme.

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- 5 I have accepted the Commission's findings that competition in this vital sector is not working well and that immediate steps need to be taken to improve competition.¹ I now seek Cabinet agreement to the proposed Government response to the Commission's recommendations (set out at Annex One). This response agrees with 12 of the 14 recommendations made by the Commission and proposes actions to implement them.
- 6 The Commission's recommendations are a strong set of actions to address barriers to more effective competition developing. However, I believe further action may be needed to directly improve competition. I propose further work on structural steps to improve competition, such as potentially requiring major grocery retailers to divest retail stores. I propose developing a regulatory wholesale access regime to provide a 'regulatory backstop' for the quasi-regulatory wholesale access regime proposed by the Commission.
- 7 I also propose establishing a grocery sector regulator and will bring decisions back to Cabinet to confirm the design of the regulator. I propose that the Commerce Commission would act as interim regulator while the grocery regulator is established. Separately, I am also seeking Cabinet's agreement to release a consultation paper on mandatory unit pricing.
- 8 In October 2022, I will return to Cabinet for decisions on a draft Grocery Industry Competition Bill for introduction to the House, decisions on funding for the regulator, and to provide a detailed cost-benefit analysis of retail divestment options. In October, I will also return to Cabinet for decisions on mandatory unit pricing regulations and the content of a grocery code of conduct for major grocery retailers and suppliers.
- 9 Some actions will need further policy development to enable drafting of the Bill to proceed at pace. I will return to Cabinet for decisions on the design of the grocery regulator and dispute resolution scheme and wholesale access regime. I seek delegated authority to make policy decisions on other technical matters, in line with the policy intent of this paper, to enable policy and legislative progress to proceed quickly.

Background

- 10 Groceries are an essential purchase and a major expense for most households. In the year to September 2021, more than \$22 billion was spent at supermarkets and grocery stores. In the year to June 2019, food was the second largest expense for households, with an average spend of \$234 per week or 17 percent of weekly expenditure. Households with lower incomes, such as super-annuitants and Māori, often allocate an even higher proportion of their expenditure to groceries on average.
- 11 Recent increases in grocery prices are putting more pressure on many households. In the year ended April 2022, food prices increased 6.4 percent and fruit and vegetable prices 9.4 percent (down from price increases in the year ended March 2022 of 7.6 percent for food and 18 percent for fruit and vegetables). As a lack of workable competition is one factor that can contribute to higher grocery prices, it is timely to consider the state of competition in this sector and what can be done to improve it.

The Commission's findings

- 12 On 17 November 2020, I published a notice under the Commerce Act 1986 asking the Commission to carry out a market study to investigate factors affecting competition for

¹ Cabinet agreement to accept the Commission's findings was provided on 7 March 2022 [CAB-22-MIN-0061 refers].

the supply or acquisition of groceries. The Commission published its final report on 8 March 2022. The Commission found that competition is not working well for consumers in the retail grocery sector and noted that:

- 12.1 The market structure is a duopoly of two major grocery retailers (Foodstuffs New Zealand and Woolworths New Zealand) with other fringe retailers (such as premium grocers or meal kit providers) having a limited impact on competition.
 - 12.2 Major grocery retailers are each other's closest competitors but the intensity of competition between them is muted due to factors including their similar competitive strategies and close monitoring of one another.
 - 12.3 Major grocery retailers earned Returns on Average Capital Employed (ROACE) of between 12.7 and 13.1 percent between 2015 to 2019, which is more than double the Commission's central estimate of a normal return for grocery retailing in New Zealand of 5.5 percent.
 - 12.4 Major grocery retailers earn excess profits of approximately \$430 million a year.²
 - 12.5 New Zealand grocery prices appear relatively high by international standards, with New Zealand ranking at least fifth highest spend per capita on grocery products in the OECD in 2017.
- 13 The Commission found that the New Zealand market could sustainably accommodate at least one more large-scale grocery retailer. Entry or expansion of a large-scale competitor is likely to be the greatest driver of long-term competition. However, the Commission saw little prospect of new or expanding grocery retailers achieving the scale required to compete with major grocery retailers under current market conditions.
 - 14 The Commission also found that for most suppliers, particularly smaller ones, there appears to be an imbalance in bargaining power in favour of major grocery retailers. This appears to also impact Māori suppliers, which account for a significant proportion of primary production.

The Commission's recommendations

- 15 The Commission's report made 14 recommendations in four areas, as set out below.

Area 1: Improving conditions for entry and expansion

- 16 The Commission considers that the best way to improve competition in the retail grocery sector is through measures to improve conditions for a new retailer to enter the market, or for an existing player to expand its offering to compete on a similar scale to major grocery retailers. The Commission made the following recommendations:
 - 16.1 **Recommendation 1:** Improve the availability of sites for retail grocery stores under planning law.

² This is based on a comparison of the average ROACE of 12.9 percent to a WACC estimate of 5.5 percent. The Commission also noted that if major grocery retailers' WACC was 6.6 percent (the Commission's higher WACC estimate), major grocery retailers' excess profits would be approximately \$365m per year.

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- 16.2 **Recommendation 2:** Prohibit restrictive and exclusive covenants that inhibit retail grocery store development and monitor land banking by the major grocery retailers.
- 16.3 **Recommendation 3:** Require the major grocery retailers to consider requests for wholesale supply in good faith and meet associated disclosure obligations.
- 16.4 **Recommendation 4:** The next reviews of the Overseas Investment Act 2005 and Sale and Supply of Alcohol Act 2012 should consider whether these Acts unduly impede entry or expansion by grocery retailers.
- 16.5 **Recommendation 5:** Monitor strategic conduct that affects the conditions of entry or expansion (such as the use of best price clauses and exclusive supply agreements).

Area 2: Improving competition for the acquisition of groceries

- 17 The Commission found evidence of imbalances in bargaining power between major grocery retailers and their suppliers. This imbalance affects the terms on which retailers acquire groceries from suppliers. The Commission made the following recommendations:
 - 17.1 **Recommendation 6:** Introduce a mandatory code of conduct to govern relationships between major grocery retailers and suppliers.
 - 17.2 **Recommendation 7:** Consider a statutory authorisation or exception for collective bargaining by grocery suppliers.
 - 17.3 **Recommendation 8:** Amend the Fair Trading Act to strengthen the business-to-business unfair contract terms regime.

Area 3: Improving the ability of consumers to make informed decisions

- 18 Consumers' access to information enables them to make informed shopping decisions between different products and retailers. More informed consumers place more pressure on retailers to offer competitive prices, increase their range of products and innovate. The Commission made the following recommendations:
 - 18.1 **Recommendation 9:** Major grocery retailers should ensure pricing and promotional practices are simple and easy to understand.
 - 18.2 **Recommendation 10:** Mandate the consistent display of unit pricing on grocery products.
 - 18.3 **Recommendation 11:** Major grocery retailers should ensure disclosure relating to loyalty programmes and data collection and use is clear and transparent.
 - 18.4 **Recommendation 12:** Major grocery retailers should cooperate with price comparison services.
- 19 Recommendations 9, 11 and 12 are directed to major grocery retailers. I have written to each major grocery retailer asking them to progress these recommendations. Each reported back to me on 8 April 2022 outlining actions they will take. I have asked each to provide me with monthly updates on progressing these recommendations.

Area 4: Monitoring, oversight and review of retail grocery competition

- 20 The Commission recommended that there be greater oversight and monitoring of the retail grocery sector and to undertake another review of competition after its recommendations have been implemented. The Commission made the following recommendations:
- 20.1 **Recommendation 13:** Establish a grocery regulator and dispute resolution scheme.
 - 20.2 **Recommendation 14:** Review the state of competition in the grocery sector three years after recommendations are implemented and collect information to support this review.
- 21 The grocery sector regulator and dispute resolution scheme would support implementation of other recommendations, such as the Grocery Code of Conduct.

Proposed Government response to the recommendations

- 22 I have accepted the Commission's finding that competition is not working well in the retail grocery sector [CAB-22-MIN-0061 refers]. I now seek Cabinet agreement to respond to each of the Commission's recommendations as outlined in Annex One of this paper.
- 23 The Commission noted that the best way to improve competition is through measures to improve the conditions for entry and expansion to allow an additional competitor or competitors to compete with the current major grocery retailers. I see the Commission's recommendations as a robust package of steps to improve conditions for this entry and expansion in the market and to bring about the benefits that more competition can provide to consumers.
- 24 I agree with 12 of the Commission's 14 recommendations. I disagree with recommendation 3, that it is sufficient to implement a quasi-regulatory wholesale access regime, as I intend to also implement a regulatory wholesale access regime. I also disagree with recommendation 14 to review competition three years after implementing the recommendations. Given the public's expectation of effective and timely improvements to competition in the grocery sector, I intend that the regulator closely monitor competition through annual reviews, rather than a review in three years' time.
- 25 In response to the Commission's recommendations and findings, I propose to:
- 25.1 develop a Grocery Industry Competition Bill to implement recommendations requiring legislation;
 - 25.2 work with Ministerial colleagues on recommendations relating to planning law, sale of alcohol and overseas investment legislation;
 - 25.3 consult on options to mandate the consistent use of unit pricing and on a code of conduct for major grocery retailers and suppliers;
 - 25.4 establish new institutional arrangements to regulate the grocery sector; and

- 25.5 progress work on structural options that go beyond the Commission's recommendations, such as retail divestment.
- 26 My proposed approach to progressing each of these actions is explained below. I believe this approach responds to the Commission's key findings and promotes the overall purpose of the reform of improving competition in the grocery sector for the benefit of the consumers.

Grocery Industry Competition Bill

- 27 Legislation is needed to implement several of the Commission's recommendations. I intend to develop a Grocery Industry Competition Bill (the Bill) and introduce this to the House in October 2022.

Key features

Providing a regime for wholesale access to supply (Recommendation 3)

- 28 The Commission found there is a lack of wholesale access to a full range of grocery products at competitive prices. A grocery retailer cannot provide a full selection of grocery products at affordable prices needed to compete with major grocery retailers without first obtaining these on reasonable terms from either suppliers or a wholesaler.
- 29 The Commission recommended implementing a wholesale access regime where major grocery retailers consider developing commercial models to supply other retailers, with regulatory measures to ensure that agreements are considered in good faith, that terms are transparent and that a dispute resolution scheme is established for supply disputes.
- 30 This regime can benefit smaller retailers looking to secure more certain access to wholesale supply and provide a stepping-stone option for larger retailers until they secure their own supply arrangements. Major grocery retailers have expressed a willingness to offer wholesale supply to other retailers under such a model, though the terms under which they are willing to offer this supply are unclear.
- 31 I intend to include the following features in the Bill:
- 31.1 providing the regulatory requirements for a 'quasi-regulatory' access regime for wholesale grocery supply, with major grocery retailers being required to:
 - 31.1.1 consider requests for supply in good faith;
 - 31.1.2 notify the regulator of all requests for supply, the outcome of the request and the reasons if declined;
 - 31.1.3 put in place formalised rules, criteria and procedures for considering requests;
 - 31.1.4 put in place standardised terms and conditions of wholesale supply, or to the extent that particular terms and conditions are not standardised (such as price) principles for determining how such terms and conditions will be decided; and

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- 31.1.5 provide a copy of their standardised terms to the regulator and to any person who requests them for the purpose of considering or making a request for commercial wholesale supply;
 - 31.2 providing for a dispute resolution scheme to address supply disputes between major grocery retailers and access seekers (as outlined in the institutional arrangements section below); and
 - 31.3 providing for civil penalties (including penalties based on percentage of retailer turnover) and remedies (including injunctions, undertakings and damages) for failure to comply with the obligations outlined in the above subparagraphs – these would be based on similar compliance provisions in the Commerce Act 1986.
- 32 Given the quasi-regulatory nature of the proposed regime, it is possible that major grocery retailers may not offer competitive wholesale access to other retailers. Therefore, I also propose that officials develop a mandatory wholesale grocery access regime to form a ‘backstop’ for this option. This mandatory regime could be triggered if certain criteria are met (or not met) and may include:
- 32.1 imposing a ‘must supply’ obligation on major grocery retailers in response to reasonable requests for wholesale groceries;
 - 32.2 providing that terms and conditions of supply are determined by a regulated process, which may be based on principles of ‘equivalence’ or ‘non-discrimination’, or on a regulated ‘cost of supply’ basis;
 - 32.3 outlining a process for setting the terms of supply, which may be either through arbitration (if commercial negotiations fail), by a regulator (such as the Commerce Commission) making a determination, or in accordance with a manual developed by each major grocery retailer and audited by the regulator; and
 - 32.4 setting out the civil penalties and remedies for contravention of the access obligations, which would be similarly based on the compliance provisions in the Commerce Act 1986.
- 33 Officials are currently developing the criteria, requirements and trigger for implementing a regulated wholesale access regime for inclusion in the Grocery Industry Competition Bill. The detailed requirements for the regime would be set in secondary legislation and/or as part of a determination made by the Commission for the designated major grocery retailer.
- 34 Further work is needed to determine the detail of both the quasi-regulatory wholesale access regime and a mandatory regime as a backstop due to the complexity of designing and developing wholesale access regimes for a dynamic market such as retail grocery. I will return to Cabinet for a decision on the criteria, requirements and trigger for the regulatory backstop, and the detail of the quasi-regulatory regime.

Prescribing a mandatory code of conduct for retailers and suppliers (Recommendation 6)

- 35 The Commission recommended a code of conduct to address power imbalances between major grocery retailers and their suppliers. I agree with this recommendation. I intend to include the following features in the Bill:

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- 35.1 powers to prescribe a mandatory code of conduct for major grocery retailers and their suppliers (the Grocery Code of Conduct) and the content as set out at paragraph 35.4;
 - 35.2 powers to make the Grocery Code of Conduct mandatory for designated retailers;
 - 35.3 transitional arrangements clarifying how the Grocery Code of Conduct applies to existing contracts;
 - 35.4 providing that the Grocery Code of Conduct may include the following content:
 - 35.4.1 an overarching expectation of conduct in regard to commercial dealings between suppliers and retailers in the grocery industry;
 - 35.4.2 minimum requirements for grocery supply agreements between suppliers and retailers;
 - 35.4.3 conduct obligations on retailers in relation to issues of product supply and placement, including changes in supply chain processes, fresh produce standards and quality specifications, range reviews, shelf allocation and delisting;
 - 35.4.4 conduct obligations on retailers in relation to issues of payment, price increases and promotions, including timing of payments and responsiveness to price increases, limiting payments for retailers' business activities, product placement and other costs, limiting payments in relation to shrinkage, wastage and consumer complaints, promotional pricing, investment buying and forecasting errors;
 - 35.4.5 a dispute resolution scheme to be available to suppliers in the event they have an issue in relation to a provision covered by the Grocery Code of Conduct;
 - 35.4.6 obligations on retailers in relation to the Grocery Code of Conduct, including a duty to keep records, train staff and provide reporting information to the regulator.
 - 35.5 establishing the necessary powers and functions for the regulator to monitor and enforce the Grocery Code of Conduct, including an investigation power that enables the regulator to require a retailer or supplier to provide information and appropriate protections for whistle-blowers and complainants; and
 - 35.6 providing for civil penalties (including penalties based on percentage of retailer turnover) and remedies (including injunctions, undertakings and damages) for failure to comply with the Grocery Code of Conduct.
- 36 The content of the Grocery Code of Conduct will be set in secondary legislation. I have asked Ministry of Business, Innovation and Employment (MBIE) officials to work with a code advisory group of industry members (including the major grocery retailers, consumer and supplier groups) to develop a consultation paper on the possible content of the Grocery Code of Conduct.

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- 37 The Grocery Code of Conduct may impact on property rights in the form of contractual supply arrangements. I will ensure this is considered so that transitional provisions provide a reasonable amount of time for existing contracts to be aligned with the secondary legislation.
- 38 I will return to Cabinet in Confidential advice to Government for approval to release this consultation paper. Final policy decisions on the Grocery Code of Conduct will be sought at Cabinet in October 2022. The code itself would then be drafted as secondary legislation in early 2023.

Developing an exception for collective bargaining (Recommendation 7)

- 39 The Commission considered that greater scope for suppliers to collectively negotiate could help to address imbalances in relationships with major grocery retailers. Supplier confidence may be improved by an ability to negotiate common contract terms collectively, as would their confidence to respond where major grocery retailers seek to modify non-price terms.
- 40 As collective bargaining involves an arrangement between competitors, there is a risk that it may contravene Part 2 (restrictive trade practices) of the Commerce Act 1986 by the arrangement containing a cartel provision or substantially lessening competition. Although such arrangements can be authorised by the Commission under the Commerce Act 1986 where they are likely to be of net public benefit, there are costs in obtaining an authorisation, which may discourage small businesses from applying.
- 41 I agree with the Commission that there is value in removing legislative barriers to suppliers collectively negotiating reasonable terms of supply with major grocery retailers. This could reduce the power imbalance major grocery retailers may hold where suppliers negotiate independently of one another.
- 42 I propose to develop an exception from Part 2 of the Commerce Act 1986 for collective bargaining by certain grocery suppliers with retailers. This exception would facilitate arrangements and interactions between eligible suppliers for the collective negotiation of reasonable terms of supply in their common interests, with a reasonable degree of confidence they are not contravening the Commerce Act. There are risks to manage in affording competitors opportunities to negotiate collectively. These risks would be accounted for in the design of the exception, namely by making it available within certain constraints necessary to rule out unintended outcomes, such as collective boycott and be subject to certain disclosure obligations for transparency.
- 43 As I set out below under 'institutional arrangements and review', I also propose that the regulator monitor supplier margins over time against benchmarks to understand how supplier margins may evolve as negotiating positions of suppliers are rebalanced.

Strengthening unfair contract terms provisions for retail grocery suppliers (Recommendation 8)

- 44 The recent Fair Trading Amendment Act 2021 (which is due to fully come into force on 16 August 2022) extended unfair contract terms protections, a feature of consumer-to-business contracts, to some small business-to-business contracts. The Commission considered that the features of this regime could be strengthened to improve competition by addressing the power imbalance between retailers and their suppliers.

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- 45 The Commission recommended that the business-to-business unfair contract terms regime be strengthened to:
- 45.1 allow private action in respect of unfair contract terms;
 - 45.2 simplify the mechanism for imposing penalties and other remedies in relation to the use of unfair contract terms; and
 - 45.3 raise the transaction value cap from \$250,000 to reflect the fact that many grocery suppliers' trading relationships will exceed this amount but still face a substantial imbalance in bargaining power with major grocery retailers.
- 46 I propose to strengthen business-to-business unfair contract terms provisions to allow private action in respect of unfair contract terms and to raise the transaction value cap. While there is value in simplifying the mechanism for imposing penalties in relation to use of unfair contract terms, the design of the unfair contract term provisions in the Fair Trading Act means this would be complicated to implement for a single industry. Therefore, I will consider simplifying the penalties regime as part of later work to address the enforcement of unfair contract terms across business-to-business contracts in the wider economy.
- 47 To strengthen business-to-business unfair contract terms protections for grocery suppliers, the Bill should:
- 47.1 create a new category of 'grocery supply contract' to appropriately target the new unfair contract terms provisions to business-to-business contracts for the supply of groceries to a large grocery retailer;
 - 47.2 increase the transaction cap for a grocery supply contract to \$1 million (in a financial year), meaning that all grocery supply contracts below that amount have the added protection of the unfair contract terms regime;
 - 47.3 allow any party to a grocery supply contract to seek a declaration from the relevant Court that a contract term in the grocery supply contract is an unfair contract term; and
 - 47.4 provide that all other relevant provisions of the Fair Trading Act 1986 applicable to the unfair contract terms provisions (including penalties and Commerce Commission powers) apply to this new category of 'grocery supply contract'.

Establishing a regulator and dispute resolution scheme (Recommendation 13)

- 48 I propose establishing a grocery sector regulator and one or more dispute resolution schemes. The regulator would have responsibility for general oversight and monitoring of the sector, while the dispute resolution scheme would deal with disputes relating to wholesale access and the Grocery Code of Conduct. I set out the role and functions of the regulator in paragraph 59 below.
- 49 To establish a grocery sector regulator and one or more dispute resolution schemes, the new Bill should include provisions for the:
- 49.1 role of the regulator to oversee and monitor the retail grocery sector;

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- 49.2 functions and powers of the regulator (as set out in paragraph 59); and
- 49.3 role and function of a dispute resolution scheme to determine disputes between the major grocery retailers and suppliers in relation to the Grocery Code of Conduct and/or disputes in relation to wholesale grocery supply arrangements.

50 In the institutional arrangements section below I propose to establish a grocery sector regulator. The Commerce Commission would act as the interim regulator while the design of the grocery sector regulator is confirmed and implemented. Decisions on the dispute resolution scheme will be considered further as part of defining the detail of the regulator as this scheme may sit with the regulator or separately.

Commerce (Grocery Sector Covenants) Amendment Bill

51 I am also progressing changes to prohibit restrictive and exclusive covenants over land and leases (the Commission's recommendation 2). This will be implemented through the Commerce (Grocery Sector Covenants) Amendment Bill to be introduced on Budget night. I have sought approval to introduce this legislation at Cabinet separately.

Recommendations relating to other portfolios

Improving site availability for retail grocery stores under planning law (Recommendation 1)

- 52 The Commission recommended several changes to planning law to support retail grocery sector competition by addressing issues around access to sites. I propose that the Commission's recommendations relating to the new planning system be considered by the Minister and Associate Minister for the Environment as part of resource management reform and associated work programmes. Some of the recommendations may be accommodated within the National Planning Framework (NPF) and other parts relate to the drafting of the NBA.
- 53 The Commission also recommended that district plans under the current regime should include sufficient land to enable choice in sites for the development of retail grocery stores. The Government believes expanding competitive land markets is fundamental to lowering land costs and providing more choices for the development of businesses and housing. The Ministry for the Environment will assess how to achieve three key system shifts to urban planning rules via resource management reform, which may provide additional capacity for retail development. These include consideration of:
- 53.1 providing development capacity for businesses and housing to support population growth to three times current population size;
 - 53.2 large scale, longer term corridor and grid protection for infrastructure; and
 - 53.3 wider use of mixed use zoning, where retail, commercial, and office activities are allowed in residential zones.
- 54 Together, these system changes may make it easier for new retailers and consumers to enter the market with lower land costs, while supporting walkable neighbourhoods, with less car dependency. These additional measures could complement the National Planning Statement on Urban Development and Medium Density Residential Standards by enabling substantially more development opportunities for businesses and housing.

Considering the impacts of other Acts on retail grocery competition (Recommendation 4)

- 55 The Commission recommended that the next reviews of the Overseas Investment Act 2005 and Sale and Supply of Alcohol Act 2012 consider whether these Acts unduly impede entry or expansion by grocery retailers. I note that:
- 55.1 In 2021, the Government completed major reform of the Overseas Investment Act 2005. It now strikes the right balance between managing risks posed by foreign investment while supporting productive, sustainable and inclusive foreign investment. I recognise that the Act's screening regime imposes a cost on overseas investors. I am advised these costs are proportionate to the goal of ensuring overseas investment in sensitive assets benefits New Zealand and any risks arising can be managed. No further review of this Act is planned (beyond targeted changes to improve the Act's forestry provisions) but the Treasury will monitor the performance of the Act.
- 55.2 The Minister of Justice intends to commence a review of the Sale and Supply of Alcohol Act 2012 this Parliamentary term and has asked officials to include the Commission's recommendation in the scope of this review. Any changes would need to support the objective of the Act that the sale and supply of alcohol be undertaken safely and responsibly and to minimise the harm caused by excessive or inappropriate consumption of alcohol.

Mandating consistent unit pricing for grocery products (Recommendation 10)

- 56 The Commission recommended mandating the consistent display of unit pricing for grocery products. Unit pricing is not currently mandatory in New Zealand but is used by the major grocery retailers. However, it is not used consistently, which undermines the value of unit pricing in helping consumers make informed purchasing decisions.
- 57 I propose to make unit pricing mandatory for grocery products. Several considerations will need to be worked through, including identifying which retailers unit pricing should apply to, whether any products should be exempt and how unit pricing should be displayed. I am seeking Cabinet agreement to release a consultation paper on these matters, attached at Annex Two, on the day I announce the Government's response, for a consultation period of six weeks.

Institutional arrangements and review (Recommendations 13 and 14)

Grocery sector regulator and dispute resolution scheme

- 58 The Commission's market study function and the concessions made by major grocery retailers as a result of the market study's focus on the sector (e.g. in relation to removing covenants, price freezes and reductions, and involvement in developing a mandatory code of conduct) demonstrate the benefits of shining a spotlight on sectors that do not have workable competition. I intend to maintain this scrutiny on the retail grocery sector by establishing a grocery sector regulator.
- 59 As set out above, I propose establishing a grocery sector regulator and dispute resolution scheme. Building on the Commission's recommendations, I propose that the functions and powers of the regulator would be to:

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- 59.1 enforce the Grocery Code of Conduct in situations where dispute resolution or private enforcement is not appropriate or does not lead to satisfactory outcomes;
 - 59.2 provide overall stewardship of the relationship between major grocery retailers and suppliers, including the dissemination of best-practice information and guidance to sector participants about productive and appropriate retailer-supplier relationships, informed by aggregated information received from the dispute resolution scheme;
 - 59.3 monitor requests for wholesale supply under the quasi-regulatory regime recommended by the Commission and monitor the terms on which wholesale supply is provided, providing recommendations (but not enforcement) about principles for wholesale supply arrangements, and reporting to government on the success or otherwise of commercial wholesale supply arrangements;
 - 59.4 enforce the obligations on major grocery retailers to prepare and disclose their processes and requirements for wholesale grocery supply;
 - 59.5 monitor and enforce supply arrangements under the regulatory wholesale grocery access regime to be implemented as a 'regulatory backstop' for the quasi-regulatory wholesale supply regime;
 - 59.6 monitor and report on the pricing and promotional practices and loyalty programme terms and conditions, of the major grocery retailers;
 - 59.7 monitor and report on government progress at improving the conditions of entry and expansion for grocery retailers, including under planning law, by undertaking annual 'state of competition' reports on competition in the sector;
 - 59.8 monitor and enforce compliance by major grocery retailers with prohibitions on the use of restrictive covenants and exclusivity covenants in leases;
 - 59.9 monitor the extent of land banking or any other anticompetitive interests in land by the major grocery retailers;
 - 59.10 monitor the use of best price clauses and exclusive supply agreements by the major grocery retailers;
 - 59.11 monitor grocery supplier margins over time and compare these to benchmarks and international comparisons; and
 - 59.12 collect information from the major grocery retailers to monitor the sector and enable subsequent reviews of the state of competition.
- 60 A dispute resolution scheme³ would determine disputes between the major grocery retailers and suppliers in relation to the Code and disputes relating to the wholesale grocery supply arrangements.
- 61 The regulator would need robust information collection powers. This could be supplemented by obligations on major grocery retailers to disclose information to the regulator on a periodic basis. If the regulator is separate from the Commission and the

³ The dispute resolution scheme for Code disputes may be different to the dispute resolution scheme for wholesale grocery supply disputes.

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dispute resolution scheme, it would be necessary to enable collaboration and information sharing between them to maintain the coherence of the regime.

62 I am considering three options for institutional arrangements:

62.1 a dedicated business unit within MBIE with statutory functions;

62.2 the Commission being empowered to carry out the new grocery regulatory functions, with the dispute resolution functions carried out by one or more dispute resolution service providers; and

62.3 a newly-established statutory agency responsible for the new regulatory regime for the grocery sector.

63 A dedicated business unit within MBIE would be similar to the United Kingdom Groceries Code Adjudicator, which is a unit located in the Department for Business, Energy & Industrial Strategy. It would build on MBIE's experience in dispute resolution, small business programmes, regulatory enforcement, consumer protection and research and evaluation. Alternatively, giving the Commission this function would build on the Commission's expertise in sector monitoring and enforcement. The option of a newly-established statutory agency would provide a dedicated focus on grocery sector regulation and monitoring.

64 I intend to return to Cabinet in Confidential advice to Government to seek a decision on the design and institutional arrangements of the regulator. Standing up a grocery sector regulator will likely involve a period of establishment activities and transition. Given that legislation will be progressed at pace, and the fact that a regulator will be needed when key elements of the regulatory regime come into force, I propose that the Commerce Commission act as interim regulator while final decisions are taken on the design of the grocery sector regulator.

Reviewing competition and information disclosure obligations

65 The Commission recommended considering an information disclosure regime to apply to specified grocery retailers. This would allow the regulator to collect information in a consistent format on key indicators of the state of competition in the sector and the performance of the regime. I propose that the Bill include a regulation-making power to provide for this disclosure, which may include information on:

65.1 store locations and details; and

65.2 information to inform profitability assessments.

66 The Commission proposed reviewing competition three years after recommendations are implemented. While I agree that competition in the retail grocery sector should be closely monitored and reviewed again, I do not agree to wait three years before reviewing competition again. The public expects effective and timely improvements to competition in the grocery sector and I believe it is important to regularly monitor the impacts of the recommendations and the state of competition in the sector.


67 Therefore, I propose that the regulator undertake annual 'state of competition' reviews of the retail grocery sector. The detail of these reviews will be determined by the regulator and will draw on best practice for reviewing retail grocery sector competition from

overseas (such as the annual reviews undertaken by the United Kingdom Groceries Code Adjudicator). I expect that this would involve an annual review of the competition dynamics in the retail grocery sector and assess the impacts of the recommendations (rather than be an annual substantive market study akin to the one just completed).

Structural intervention options considered by the Commission

- 68 The Commission considered several ‘structural’ options involving direct intervention by government to create more competition, including retail divestment. The Commission did not recommend retail divestment at this time as it did not have sufficient information to conclude the benefits of retail divestment would outweigh the costs.
- 69 The Commission’s recommendations provide a strong starting point to improve entry and expansion, but the high degree of concentration in the market may mean that further steps are required to improve competition. I intend to progress work on how retail stores could be divested in more detail. Ensuring divested stores have access to wholesale supply will be a key issue to consider – either through a regulatory wholesale grocery access regime or considering how certain wholesale functions could be divested with retail stores to supply these stores. I intend to announce this work as part of announcing the formal Government response to the Commission’s final report.
- 70 Retail divestment would involve divestment of existing retail stores or banners by major grocery retailers to establish new grocery retailers. There are different options to undertake this that will need further consideration, such as:

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- 71 There is a high burden of proof to be met before decisions on retail divestment can be taken as the Commission did not carry out a detailed cost-benefit analysis. There are several considerations to be worked through further, including:
- 71.1 considering possible implementation options in detail;
 - 71.2 undertaking policy design and a detailed cost-benefit analysis of retail divestment options;
 - 71.3 considering potential risks and issues;
 - 71.4 understanding the potential impacts of retail divestment on retailers’ operations, economies of scale, property rights and supply models; and
 - 71.5 determining how interventions would be enforced.
- 72 Officials will consider these matters in detail between now and September 2022. I will then report back to Cabinet in October 2022 with a detailed cost benefit analysis on retail divestment options and to seek decisions on whether to proceed with further steps on

retail divestment. Based on this work, implementation options could then be developed for public consultation in early 2023.

Next steps

- 73 Next steps for progressing the Government response to the market study include:
- 73.1 introducing the Commerce (Grocery Sector Covenants) Amendment Bill for first reading on Budget night – 19 May 2022;
 - 73.2 announcing the Government response – week of 23 May 2022;
 - 73.3 releasing the consultation paper on unit pricing – week of 23 May 2022;
 - 73.4 seeking Cabinet approval to release the Code of Conduct consultation paper –
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 - 73.5 seeking Cabinet decisions on the design of the grocery sector regulator and dispute resolution scheme and wholesale access regime – Confidential advice to Government
 - 73.6 reporting back to Cabinet with detailed cost-benefit analysis of retail divestment options – October 2022; and
 - 73.7 seeking Cabinet approval to introduce the Grocery Industry Competition Bill – October 2022.

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Consultation


- 77 The Treasury, Ministry for the Environment, Land Information New Zealand, Ministry of Justice, Commerce Commission, Land Information New Zealand, Ministry of Housing and Urban Development, Te Puni Kōkiri, Te Arawhiti, Ministry for Pacific Peoples and Ministry for Primary Industries have been consulted on this paper. The Department of Prime Minister and Cabinet and Parliamentary Counsel Office have been informed.

- 78 Officials engaged with the major grocery retailers, other grocery retailers, supplier groups, consumer groups and Māori organisations as part of considering the Commission's final recommendations in March and April 2022.
- 79 MBIE will also undertake targeted stakeholder engagement with stakeholders and Māori as further policy work develops – including engaging further with major grocery retailers, suppliers, and Māori groups and iwi.

Financial Implications

- 80 The Bill will require one or more agencies to perform new functions in taking on the role as grocery sector regulator or interim regulator. This will require additional funding, some of which could be cost recovered from industry participants.
- 81 It is not yet possible to accurately cost these proposals. However, some similarities can be drawn from similar regulatory regimes implemented by the Commission for telecommunications and fuel markets.


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Legislative Implications

84 Constitutional conventions



Regulatory Impact Analysis

- 85 MBIE's Regulatory Impact Analysis Review Panel has reviewed the attached Regulatory Impact Statement *Government Response to the Commerce Commission Grocery Sector Market Study – Policy decisions*, prepared by MBIE.
- 86 The Panel notes that an advance decision taken by Cabinet on one recommendation (prohibiting covenants) from the Grocery Sector Market Study was made without a Regulatory Impact Statement and will be subject to a Supplementary Analysis Report. This decision is therefore not analysed in this Impact Statement and does not impact upon the analysis summarised in this Impact Statement.
- 87 The Panel considers that the information and analysis summarised in the Impact Statement **meets** the criteria necessary for Ministers to make informed decisions on the proposals in this paper.

- 88 MBIE's Regulatory Impact Analysis Review Panel has reviewed the attached Discussion Document *Mandatory unit pricing for grocery products* and confirms that it substitutes as an interim Regulatory Impact Statement. The Discussion Document is likely to lead to effective consultation and support the delivery of Regulatory Impact Analysis to inform subsequent decisions.

Climate Implications of Policy Assessment

- 89 The Ministry for the Environment Climate Implications of Policy Assessment (CIPA) team has been consulted and confirms that the CIPA requirements do not apply to this proposal as the threshold for significance is not met.

Population Implications

- 90 There are no specific population-specific implications from the proposals in this paper. However, improving competition in the grocery sector will be of greatest benefit to lower socio-economic groups who may spend a greater proportion of their incomes on groceries on average.
- 91 Changes will impact on Māori both as grocery suppliers and consumers. Māori have a strong role in grocery supply as primary producers and grocery suppliers. Changes to address imbalances between major grocery retailers and suppliers will benefit Māori producers in their negotiations and dealings with major grocery retailers. In addition, Māori whanau on average spend a higher proportion of their income on grocery products, so will benefit from the price benefits of increased competition.

Human Rights

- 92 The proposals in this paper are not inconsistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. Vetting will be undertaken on the draft Bill once this is developed.

Communications

- 93 Competition in the retail grocery sector and the implications of competition for grocery prices and costs of living are a significant public interest matter. The Commerce Act 1986 requires the Minister of Commerce and Consumer Affairs to respond the Commission's report within a reasonable time after the report is made publicly available.
- 94 I intend to announce the Government's final response to the Commission's market study in the week of 23 May 2022. As part of this announcement, I will note that further work is underway on additional options to improve competition, including retail divestment.

Proactive Release

- 95 I propose to proactively release this Cabinet paper and minute within 30 business days.

Recommendations

The Minister of Commerce and Consumer Affairs recommends that the Committee:

Response to the Commerce Commission's recommendations

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- 1 **note** that the Commerce Commission's (the Commission's) market study into the retail grocery sector has found that competition is not working well for consumers;
- 2 **note** that the Minister of Commerce and Consumer Affairs was directed to prepare the Government response to the final report and bring this to Cabinet in May 2022 [CAB-22-MIN-0061 refers];
- 3 **agree** to the proposed Government response to the Commission's recommendations as set out in Annex One which accepts 12 of the Commission's 14 recommendations;
- 4 **invite** the Minister of Commerce and Consumer Affairs to publicly announce the Government response set out at Annex One;
- 5 **agree** that the Minister of Commerce and Consumer Affairs progress reforms with the purpose of improving competition in the retail grocery sector for the benefit of consumers;
- 6 **agree** that a new regulatory regime for the retail grocery sector will be developed and implemented through the Grocery Industry Competition Bill (the Bill) to provide for the legislative changes needed to implement recommendations 8 to 16 below;
- 7 Constitutional conventions

Wholesale access to grocery supply

- 8 **agree** to establish an initial 'quasi-regulatory' access regime for wholesale grocery supply, with provisions included in the Bill to require major grocery retailers to:
 - 8.1 consider requests for supply in good faith;
 - 8.2 notify the regulator of all requests for supply, the outcome of the request, and the reasons if declined;
 - 8.3 put in place formalised rules, criteria and procedures for considering requests;
 - 8.4 put in place standardised terms and conditions of wholesale supply, or to the extent that particular terms and conditions are not standardised (such as price) principles for determining how such terms and conditions will be decided; and
 - 8.5 provide a copy of their standardised terms to the regulator and to any person who requests them for the purpose of considering or making a request for commercial wholesale supply;
- 9 **note** that work is underway to develop a mandatory wholesale grocery access regime to provide a 'regulatory backstop' to the wholesale access regime proposed in recommendation 8 above;
- 10 **agree** that the details of a mandatory wholesale access regime will be included in the Bill;

Grocery Code of Conduct for major grocery retailers and suppliers

IN CONFIDENCE

- 11 **agree** to establish a mandatory grocery code of conduct with provisions in the Bill to set out:
- 11.1 powers to prescribe a mandatory code of conduct for major grocery retailers and their suppliers (the Grocery Code of Conduct) and the content as set out at recommendation 11.4 below;
 - 11.2 powers to make the Grocery Code of Conduct mandatory for designated retailers;
 - 11.3 transitional arrangements clarifying how the Grocery Code of Conduct applies to existing contracts;
 - 11.4 that the Grocery Code of Conduct may include the following content:
 - 11.4.1 an overarching expectation of conduct in regard to commercial dealings between suppliers and retailers in the grocery industry;
 - 11.4.2 minimum requirements for grocery supply agreements between suppliers and retailers;
 - 11.4.3 conduct obligations on retailers in relation to issues of product supply and placement, including to changes in supply chain processes, fresh produce standards and quality specifications, range reviews, shelf allocation and delisting;
 - 11.4.4 conduct obligations on retailers in relation to issues of payment, price increases and promotions, including timing of payments and responsiveness to price increases, limiting payments for retailers' business activities, product placement and other costs, limiting payments in relation to shrinkage, wastage and consumer complaints, promotional pricing, investment buying and forecasting errors;
 - 11.4.5 a dispute resolution scheme to be available to suppliers in the event they have an issue in relation to a provision covered by the Grocery Code of Conduct; and
 - 11.4.6 obligations on retailers in relation to the Grocery Code of Conduct, including a duty to keep records, train staff and provide reporting information to the regulator;
 - 11.5 the high-level framework for a dispute resolution process in relation to the Grocery Code of Conduct, including the rights of a supplier to take a dispute and the ability for the dispute resolution process to make binding decisions;
 - 11.6 the necessary powers and functions for the regulator to monitor and enforce the Grocery Code of Conduct, including an investigation power that enables the regulator to require a retailer or supplier to provide information and appropriate protections for whistle-blowers and complainants;

Exception for collective bargaining

IN CONFIDENCE

- 12 **agree** to introduce an exception from prohibitions in Part 2 (restrictive trade practices) of the Commerce Act 1986 for collective bargaining by grocery suppliers, with provisions included in the Bill to set out:
- 12.1 which grocery suppliers the exception applies to;
 - 12.2 the scope of activities that are permitted by the exception (and certain activities that are not so permitted); and
 - 12.3 any disclosure obligations necessary for transparency;

Strengthening unfair contract terms

- 13 **agree** to strengthen business-to-business contract terms protections for grocery suppliers, with provisions included in the Bill to:
- 13.1 create a new category of 'grocery supply contract' to appropriately target the new unfair contract terms provisions to business-to-business contracts for the supply of groceries to a major grocery retailer;
 - 13.2 increase the transaction cap for a grocery supply contract to \$1 million (in a financial year), meaning that all grocery supply contracts below that amount have the added protection of the unfair contract terms regime;
 - 13.3 allow any party to a grocery supply contract to seek a declaration from the relevant court that a contract term in a grocery supply contract is an unfair contract term; and
 - 13.4 provide that all other relevant provisions of the Fair Trading Act 1986 are applicable to the unfair contract terms provisions (including penalties and Commerce Commission powers) apply to these grocery supply contracts;

Establishing a grocery regulator and dispute resolution scheme and other matters

- 14 **agree** that the Bill establish a retail grocery sector regulator and one or more dispute resolution schemes, with provisions included in the Bill to set out:
- 14.1 the role of the regulator to oversee and monitor the retail grocery sector and enforce any obligations imposed on major grocery retailers;
 - 14.2 the functions and powers of the regulator (as set out in paragraph 59 of this paper); and
 - 14.3 the role and function of a dispute resolution scheme to determine disputes between the major grocery retailers and suppliers in relation to the Grocery Code of Conduct and/or disputes in relation to wholesale grocery supply arrangements;
- 15 **agree** that the Bill provide for civil penalties (including penalties based on percentage of turnover) and remedies (including injunctions, undertakings and damages) for failure to comply with the obligations imposed under the new regulatory regime, including relating to wholesale grocery supply and the Grocery Code of Conduct;

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- 16 **agree** that the Bill include a regulation-making power to provide for record-keeping and reporting by major grocery retailers to improve monitoring of the state of competition in the sector;
- 17 **agree** that the regulator will be required to prepare annual reports on the state of competition in the grocery sector and the performance of the regime;
- 18 **agree** that the Commerce Commission act as an interim grocery regulator until the permanent grocery sector regulator function is established;

Development of legislation

- 19 **authorise** the Minister of Commerce and Consumer Affairs to make additional policy decisions and minor or technical changes to the policy decisions in this paper, consistent with the general policy intent, on issues that arise in drafting and passage through the House;
- 20 **invite** the Minister of Commerce and Consumer Affairs to report back to Cabinet to seek decisions on:
 - 20.1 the detailed design of the proposed grocery regulator and dispute resolution scheme; and
 - 20.2 the detailed design of a quasi-regulatory wholesale access regime, and the criteria, requirements and trigger for a mandatory wholesale grocery access regime to include in the Bill as a regulatory backstop;
- 21 **invite** the Minister of Commerce and Consumer Affairs to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above recommendations and draft the necessary legislation to implement these recommendations;
- 22 **authorise** the Minister of Commerce and Consumer Affairs to release drafts of the Bill, in accordance with the Attorney-General's Protocol for Release of Draft Government Legislation outside the Crown, for targeted consultation with key stakeholders if satisfied that this would improve the workability and effectiveness of the regime;

Other recommendations

- 23 **note** that the impacts of planning laws on retail grocery sector competition will be considered as part of planning law reforms;
- 24 **note** that the next review of the Sale and Supply of Alcohol Act 2012, to commence this Parliamentary term, will consider the impact of this Act unduly impedes entry or expansion by grocery retailers;
- 25 **note** that the Overseas Investment Act 2005 has just been reviewed and that no further review is currently planned, but that Treasury will monitor performance of this Act;
- 26 **note** that the Minister of Commerce and Consumer Affairs has written to each major grocery retailer asking them to implement recommendations relating to them and to provide monthly progress updates to the Minister;
- 27 **agree** to implement mandatory unit pricing for grocery products;

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- 28 **agree** to release the attached consultation paper on mandatory unit pricing for grocery products, subject to further minor and editorial changes;
- 29 **note** that the Minister of Commerce and Consumer Affairs will direct officials to continue examining retail divestment and report back to DEV in October 2022 with a detailed cost-benefit analysis on retail divestment to inform decisions on progressing further work on retail divestment options;
- 30 **note** that this Cabinet paper will be proactively released within 30 business days of final Cabinet decisions.
- 31 **invite** the Minister of Commerce and Consumer Affairs to report back to DEV in October 2022 to seek agreement on:
- 31.1 the form and content of mandatory unit pricing regulation following consultation;
and
 - 31.2 policy decisions on the content of the Code of Conduct.

Authorised for lodgement

Hon Dr David Clark

Minister of Commerce and Consumer Affairs

Annex One: Government response to the Commerce Commission’s final report on the New Zealand retail grocery sector

Improving the conditions for entry and expansion by grocery retailers to introduce more competitive pressure into the market

	Commerce Commission recommendation	Government response	Implementation approach
1	<p>Improve the availability of sites for retail grocery stores under planning law</p> <p>Several changes to planning law should be made to support competition. In particular:</p> <ul style="list-style-type: none"> • 1A: District plans should include sufficient land that is zoned to enable choice in sites for the development of retail grocery stores. • 1B: The new planning system should require Regional Spatial Strategies to provide sufficient spare capacity to enable choice in sites for the development of retail grocery stores. • 1C: The new planning system should require every Natural and Built Environments Act (NBA) Plan to include a minimum proportion of urban land that is zoned for retail grocery stores. • 1D: The new planning system should limit the discretion available to decision-makers regarding the approval of retail grocery stores. • 1E: The positive outcomes of trade competition should be considered in planning instruments under the Natural and Built Environments Act. 	<p>AGREE IN PRINCIPLE</p> <p>In relation to recommendation 1A, the Ministry for the Environment will assess how to achieve system shifts to urban planning rules via resource management reform to make it easier for new retailers (including supermarkets) to enter the market with lower land costs.</p> <p>In relation to recommendations 1B to 1D, this will be considered by the Ministry for the Environment as part of the development of the National Planning Framework (NPF), noting that the NPF will incorporate the policy intent of the NPS-UD and MDRS.</p> <p>In relation to recommendation 1E, the proposed legislative architecture of SPA and NBA will improve efficiency and effectiveness of the system, and thereby better enabling activities that have positive economic benefits. MfE will also continue to take a ‘systems’ view to consider how positive outcomes (including trade competition) could be better met through the NBA or use of a secondary instrument such as the National Planning Framework directing an outcome.</p> <p>In relation to recommendation 1F, this will be considered by the Ministry for the Environment as part of the development of the Natural and Built Environments Act. The NBA is intended to</p>	<p>Primary and secondary legislation</p> <p>Changes would primarily be enabled through primary legislation, such as the NBA, and enabled through mechanisms under primary legislation (such as the NPS-UD and National Planning Framework).</p>

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	<ul style="list-style-type: none"> 1F: Retail grocery store development should not be declined based on adverse retail distribution effects on existing commercial centres. 	<p>provide for a stronger framework to consider positive effects, and how they will contribute to specified outcomes. It is anticipated that the future NPF or RSS will provide additional direction for these outcomes.</p>	
2	<p>Prohibit restrictive and exclusive covenants that inhibit retail grocery store development</p> <p>Covenants on land and leases should be prohibited where these inhibit:</p> <ul style="list-style-type: none"> the development of retail grocery stores the operation of retail grocery stores. <p>Monitor land banking by the major grocery retailers</p> <p>The grocery sector regulator should monitor land banking by major grocery retailers.</p>	<p>AGREE</p> <p>The Government agrees that the use of covenants by major grocery retailers inhibits supermarket competition by reducing availability of sites for new entrants or current businesses looking to expand.</p> <p>The grocery sector regulator will monitor land banking by major grocery retailers.</p>	<p>Primary legislation</p> <p>Legislation is being introduced on Budget night, via the Commerce (Grocery Sector Covenants) Amendment Bill.</p>
3	<p>Require the major grocery retailers to consider requests for wholesale supply in good faith and meet associated disclosure obligations</p> <p>The Government should develop a monitored wholesale access regime to enable better access to wholesale supply by:</p> <ul style="list-style-type: none"> requiring that major grocery retailers consider all requests for commercial wholesale supply in good faith requiring major grocery retailers to put in place and disclose principles and terms and conditions of wholesale supply establishing a formal dispute resolution scheme for wholesale supply disputes. 	<p>DISAGREE</p> <p>The Government will progress a monitored wholesale access regime in line with the Commission’s recommendations as a first step towards improving wholesale access.</p> <p>However, the Government finds the Commission’s recommendation necessary but not sufficient and will develop an additional mandatory wholesale grocery access regime to provide a backstop for the voluntary regime proposed by the Commission.</p>	<p>Primary and secondary legislation</p> <p>The Grocery Industry Competition Bill will provide for the quasi-regulatory wholesale access regime recommended by the Commission.</p> <p>The criteria, requirements and trigger for the regulatory backstop will be included in the Bill. How the regulatory regime would work would be set in secondary legislation and/or as part of a determination made by the Commission for the designated major grocery retailer.</p>
4	<p>Review potential barriers to competition in other Acts</p>	<p>AGREE</p> <p>A review of the Overseas Investment Act 2005</p>	<p>Primary legislation</p>

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	The next reviews of the Overseas Investment Act and Sale and Supply of Alcohol Act should consider whether they unduly impede entry or expansion by grocery retailers.	has just been completed and the Act now strikes the right balance between managing risks posed by foreign investment while supporting productive, sustainable and inclusive foreign investment. No further review of the Act is planned, but Treasury will monitor the performance of the Act. The Minister of Justice has signalled an intention to commence a review the Sale and Supply of Alcohol Act 2012 this parliamentary term. The Ministry of Justice will consider the impacts of this Act on retail grocery competition.	These recommendations will be considered as part of any upcoming review of these Acts.
5	Monitor strategic conduct that affects the conditions of entry and expansion The new grocery regulator should monitor both the use of best price clauses and exclusive supply agreements by major grocery retailers.	AGREE The Government will include this monitoring function in the design of the new retail grocery regulator.	Primary legislation This function of the grocery regulator would be defined under primary legislation (the Grocery Industry Competition Bill) as part of setting out the regulator's functions.

Improving competition for the acquisition and supply of groceries

	Commerce Commission recommendation	Government response	Implementation approach
6	Introduce a mandatory grocery code of conduct to govern relationships between the major grocery retailers and their suppliers. A mandatory code of conduct should be implemented to underpin retailers' negotiating relationships with suppliers. This code would include: <ul style="list-style-type: none"> • an overarching principle of good faith • provisions to improve the transparency of supply agreements • prohibitions or limits on certain forms of conduct 	AGREE The Government agrees to implement a mandatory Grocery Code of Conduct for major grocery retailers and their suppliers. MBIE has been developing a draft code with input from an industry advisory group to ensure the code is workable from a practical perspective. This code will draw on similar examples from the United Kingdom and Australia.	Primary and secondary legislation The ability to create a mandatory Code will be provided in the Grocery Industry Competition Bill. The content of the Code itself would be implemented through secondary legislation.

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	<ul style="list-style-type: none"> an independent dispute resolution scheme to address any issues that arise under the Grocery Code of Conduct. 		
7	<p>Consider a statutory authorisation or exception for collective bargaining by grocery suppliers.</p> <p>An authorisation or exception should be implemented to enable collective bargaining by grocery suppliers as part of rebalancing negotiating relationships with retailers.</p>	<p>AGREE</p> <p>The Government agrees to implement an exception from relevant provisions in the Commerce Act to allow grocery suppliers to collectively bargain.</p>	<p>Primary legislation</p> <p>The Grocery Industry Competition Bill will provide an exception for collective bargaining by certain grocery suppliers with retailers.</p>
8	<p>Amend the Fair Trading Act to strengthen the business-to-business unfair contract terms regime.</p> <p>Changes should be progressed to the Fair Trading Act to extend provisions as they relate to retail grocery to allow private action in respect of unfair contract terms, simplify the mechanism for imposing penalties and remedies and raise the transaction value cap of \$250,000.</p>	<p>AGREE</p> <p>The Government will implement changes to the Fair Trading Act unfair contract terms regime to allow private action in respect of unfair contract terms and raise the transaction value cap for grocery supply contracts.</p> <p>Ways to simplify the mechanism for imposing penalties and remedies will be considered later to enable this recommendation to be considered for other industries.</p>	<p>Primary legislation</p> <p>The provisions for strengthened unfair contract terms provisions would be set in primary legislation through the Grocery Industry Competition Bill, and future amendments to the Fair Trading Act.</p>

Improving the ability of consumers to make informed purchasing decisions

	Commerce Commission recommendation	Government response	Implementation approach
9	<p>Pricing and promotional practices</p> <p>The major grocery retailers should ensure their pricing and promotional practices are simple and easy to understand.</p>	<p>AGREE</p> <p>The Government agrees that major grocery retailers should ensure their pricing and promotional practices are simple and easy to understand. The Government expects the major grocery retailers to respond to this recommendation and implement any actions needed.</p>	<p>To be implemented by major grocery retailers</p> <p>Progress updates will be provided to the Minister of Commerce and Consumer Affairs.</p>
10	<p>Mandate the consistent display of unit pricing</p>	<p>AGREE</p> <p>The Government considers there is value for</p>	<p>TBC pending further policy decisions</p>

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	Mandatory unit pricing for supermarket goods should be implemented to improve consumers' ability to make informed purchasing decisions and to compare products.	consumers in implementing mandatory unit pricing. A consultation paper will be released in late May 2022 to seek views on how unit pricing could be designed and implemented.	Officials are considering implementing mandatory unit pricing for groceries, either through changes to primary legislation (e.g., the Weights and Measures Act 1987) or through a consumer information standard under the Fair Trading Act 1986.
11	Loyalty programmes and consumer data collection and use The major grocery retailers should ensure disclosure relating to loyalty programmes and data collection and use practices is clear and transparent.	AGREE The Government agrees that major grocery retailers should ensure disclosure relating to loyalty programmes and data collection and use is clear and transparent. The Government expects the major grocery retailers to respond to this recommendation and implement any actions needed.	To be implemented by major grocery retailers Progress updates will be provided to the Minister of Commerce and Consumer Affairs.
12	Price comparison services The major grocery retailers should cooperate with price comparison services that offer consumers with information on how to compare the value of different supermarket goods.	AGREE The Government agrees that major grocery retailers should cooperate with price comparison services. The Government expects the major grocery retailers to respond to this recommendation and implement any actions needed.	To be implemented by major grocery retailers Progress updates will be provided to the Minister of Commerce and Consumer Affairs.

Introducing a monitoring and oversight regime and reviewing competition again in three years based on information gathered by a regulator

	Commerce Commission recommendation	Government response	Implementation approach
13	Establish a grocery regulator and dispute resolution scheme A regulator should be established for the purpose of providing oversight of the retail grocery sector and monitoring and reporting. A dispute resolution scheme should be established to consider disputes relating to	AGREE The Government will establish a retail grocery regulator to oversee and monitor the retail grocery sector and one or more dispute resolution schemes to hear disputes relating to wholesale access and the Grocery Code of Conduct.	Primary legislation The Grocery Industry Competition Bill will include provisions setting out the role and functions of the grocery regulator and dispute resolution scheme.

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	both the code of conduct and disputes regarding commercial wholesale supply arrangements.	The Government will consider options for establishing the regulator. The Commerce Commission would act as interim regulator while the final design of the regulator is completed and implemented.	
14	<p>Reviewing the state of competition</p> <p>The Government (via MBIE or the grocery sector regulator) should review the state of competition in the grocery sector three years after implementation of the recommendations and collect information in the interim to support this review.</p>	<p>DISAGREE</p> <p>The Government agrees to enable the collection of information from grocery retailers and for a review of competition in the retail grocery sector.</p> <p>However, the Government proposes that the grocery sector regulator review the state of competition annually, rather than three years after implementation of the recommendations.</p>	<p>Primary and secondary legislation</p> <p>The Grocery Industry Competition Bill will include a regulation-making power to require disclosure of certain information to the regulator to enable it to review the sector. The specific requirements of the disclosure regime would be set in regulations.</p>

Further matters – structural options

The Government is committed to promoting effective competition in the grocery sector for the benefit of consumers and recognise that further steps may be needed to improve competition. MBIE will undertake further research and policy analysis on structural options, such as retail divestment, to understand the costs and benefits of such options and how they could be implemented to improve competition. This research and policy analysis will be completed before any decisions on these potential actions are made.